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11 **IN THE UNITED STATES DISTRICT COURT**
12 **DISTRICT OF ARIZONA**

13 **MARIA M. GONZALEZ, et al.,**

14 **Plaintiffs,**

15 **v.**

16 **STATE OF ARIZONA, et al.**

17 **Defendants.**

No. CV06-01268 PHX ROS

No. CV06-1362 PCT ROS (Cons)

No. CV06-1575 PCT ROS (Cons)

**MOTION IN LIMINE RE
PLAINTIFF EXPERT OPINIONS**

**(Assigned to the
Honorable Roslyn O. Silver)**

1 **MOTION**

2 Defendants State of Arizona; Secretary of State Jan Brewer; Maricopa County
3 Recorder Helen Purcell and Maricopa County Elections Director Karen Osborne;
4 Apache County Recorder LeNora Johnson and Apache County Elections Director Penny
5 L. Pew; Cochise County Recorder Christine Rhodes and Cochise County Elections
6 Director Thomas Schelling; Gila County Recorder Linda Haught Ortega and Gila
7 County Elections Director Dixie Mundy; Graham County Recorder Wendy John and
8 Graham County Elections Director Judy Dickerson; Greenlee County Recorder Berta
9 Manuz and Greenlee County Elections Director Yvonne Pearson; La Paz County
10 Recorder Shelly Baker and La Paz County Elections Director Donna Hale; Mohave
11 County Recorder Joan McCall and Mohave County Elections Director Allen Tempert;
12 Pima County Recorder F. Ann Rodriguez and Pima County Elections Director Brad R.
13 Nelson; Santa Cruz County Recorder Suzie Sainz and Santa Cruz County Elections
14 Director Melinda Meek; Yavapai County Recorder Ana Wayman-Trujillo and Yavapai
15 County Elections Director Lynn A. Constabile; and Yuma County Recorder Susan
16 Hightower Marler and Yuma County Elections Director Patti Madrill (collectively
17 “Defendants”), by and through undersigned counsel, move in limine to exclude
18 Plaintiffs’ experts’ supplemental reports produced after Court-ordered deadlines.

19 The deadline for the disclosure of plaintiffs’ expert opinions was January 4, 2008,
20 with provision in the scheduling order for plaintiffs to serve rebuttal reports by March 7,
21 2008. Gonzalez plaintiffs served five expert reports on January 4, 2008, from five
22 different experts. Since then, Gonzalez plaintiffs have disregarded the Court-ordered
23 expert schedule and served at their own convenience sixteen additional reports up
24 through June 4, 2008. Because of plaintiffs’ disregard of both the Court’s order and the
25 spirit of Rule 26, Defendants have been forced to prepare for and respond to numerous
26 additional opinions and analyses that should have been disclosed by the appropriate
27 deadlines. With regard to those plaintiff expert disclosures made recently, Defendants
28 have not had an adequate opportunity to respond to those additional and untimely expert
opinions. Moreover, Defendants should not be put to the considerable expense of
responding to such untimely reports.

1 The Court should exclude any testimony regarding those expert opinions that
2 were untimely disclosed. With minimal exceptions discussed below, the opinions to be
3 excluded are those opinions disclosed by plaintiffs after March 28, 2008, and one
4 “rebuttal” report of Dr. Rosales disclosed by plaintiffs on March 7, 2008. This Motion is
5 accompanied by the following Memorandum of Points and Authorities, incorporated
6 herein by reference.

7 **RESPECTFULLY SUBMITTED** this 16th day of June, 2008.

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9 **MARICOPA COUNTY ATTORNEY**

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19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 Under the Court’s scheduling order, plaintiffs’ expert reports were due on January
21 4, 2008. Defense expert reports were due on February 15, 2008, and plaintiff rebuttal
22 reports were due on March 7, 2008. [Dkt. 740 ¶ E] At the March 21, 2008, scheduling
23 conference, plaintiffs asked for more time to supplement their expert reports based on
24 additional rejected voter registration forms being produced by the county defendants and
25 based on the conditional provisional ballot information to be produced by the county
26 treasurers. [See dkt. 735]

27 With regard to their voter registration (“phase I”) opinions, plaintiffs were
28 ordered to supplement any expert reports by March 28, 2008. [Dkt. 740 ¶ E] With

1 regard to the conditional provisional ballot (“phase II”) opinions, plaintiffs were ordered
2 to disclose their expert opinions by April 25, 2008. [See dkt. 735 at 39:2-8] After
3 months of asserting that they would conduct a survey of both rejected registrants and
4 voters who voted conditional provisional ballots, ITCA plaintiffs withdrew their expert
5 and served no reports.

6 Gonzalez plaintiffs apparently attempted to make up for the lack of expert
7 opinions by the ITCA plaintiffs by serving sixteen additional expert reports after initially
8 serving five reports on January 4, 2008.

9 **A. The “Rebuttal” Report of Dr. Rosales.**

10 Defendants do not object on timeliness grounds to testimony regarding those
11 opinions disclosed on January 4, 2008, and in the rebuttal reports on March 7, 2008,
12 except with regard to plaintiff expert Arturo Rosales. Plaintiffs served an initial report
13 by Dr. Rosales on January 4, 2008, and a “rebuttal” report by Dr. Rosales on March 7,
14 2008.

15 In his first report, Dr. Rosales offered opinions on historical discrimination of
16 Mexican Americans. He offered no opinions about conditional provisional ballots or
17 voter registration in the post Proposition 200 period. Defendants did not serve any
18 response report to Dr. Rosales first report. Thus, there was no responsive report by
19 Defendants to warrant a rebuttal from Dr. Rosales. Instead, Defendants deposed Dr.
20 Rosales on February 27, 2008, during which he testified that all the opinions he intended
21 to testify to at trial were disclosed in his January 4, 2008 report. Nonetheless, plaintiffs
22 served a self-styled “rebuttal” report with new opinions by Dr. Rosales on March 7,
23 2000.

24 Dr. Rosales should be precluded from offering opinions that were first disclosed
25 in his “rebuttal” report of March 7, 2008, because those opinions were untimely
26 disclosed. *See, e.g., Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont. 1998)
27 (excluding untimely expert opinions served after deadline for initial expert opinion
28 where later report offered new and different opinions; holding that rebuttal evidence is
evidence “intended solely to contradict or rebut evidence on the same subject matter
identified by another party”) (quoting Fed. R. Civ. P. 26(a)(2)(C)).

1 **B. The Untimely Opinions Disclosed After March 28, 2008.**

2 Under the Final Amended Scheduling Order, plaintiffs were required to disclose
3 all expert rebuttal and supplemental opinions by March 28, 2008. [Dkt. 740 ¶ E] Thus,
4 although the scheduling order provides that “Plaintiffs shall disclose any rebuttal expert
5 testimony by March 7, 2008,” the Court permitted plaintiffs to “finally *supplement* their
6 preliminary expert reports by March 28, 2008.” [*Id.* (emphasis added)]

7 There were only two exceptions to that March 28, 2008, deadline. First, plaintiffs
8 could “finally supplement their expert reports with any analysis of supplemental
9 discovery of rejected voter registration forms from Yuma County within seven business
10 days following receipt of those forms from Yuma County.” [*Id.*] Because Yuma
11 County did not subsequently locate any additional voter registration forms, however,
12 none were produced after the close of fact discovery in January 2008. Therefore, there
13 were no additional data upon which plaintiff experts could base any supplemental
14 opinions for phase I.

15 Second, plaintiffs could “finally supplement their expert reports on phase II
16 (conditional provisional ballots) by April 25, 2008.” [*Id.*] Because plaintiffs would
17 have until April 25, 2008, to disclose opinions regarding phase II (conditional
18 provisional ballots), the Final Amended Scheduling Order provided that Defendants
19 would have until May 9, 2008, to respond to those additional opinions, and that plaintiffs
20 would have until May 23, 2008, to serve any rebuttal opinions. Again, however, it was
21 clear from the March 21, 2008, scheduling conference that the last round of expert
22 disclosures were for the limited purpose of addressing issues regarding the conditional
23 provisional ballots (due to the spring production by the counties of conditional
24 provisional ballot envelopes).

25 1. The Opinions of Louis Lanier.

26 Dr. Lanier served the following reports on the dates indicated:

- 27 • First Report (“The Effect of Proposition 200 on Voter Registration in
28 Arizona”) (1/04/08)
- Second Report (“The Effect of Proposition 200 on Voter Registration in
Arizona Rebuttal Report of Louis R. Lanier, Ph.D.”) (3/07/08)

- 1 • Third Report (“The Effect of Proposition 200 on Voter Registration in
2 Arizona First Supplemental Report of Louis R. Lanier, Ph.D.”) (3/21/08)
- 3 • Fourth Report (“The Effect of Proposition 200 on Voter Registration in
4 Arizona Second Supplemental Report of Louis R. Lanier, Ph.D.”) (3/28/08)
- 5 • Fifth Report (“The Effect of Proposition 200 on Voter Registration in Arizona
6 Third Supplemental Report of Louis R. Lanier, Ph.D.”) (4/25/08)
- 7 • Sixth Report (“The Effect of Proposition 200 on Voter Registration in Arizona
8 Fourth Supplemental Report of Louis R. Lanier, Ph.D.”) (5/09/08)
- 9 • Seventh Report (“The Effect of Proposition 200 on Voter Registration in
10 Arizona Second Rebuttal Report of Louis R. Lanier, Ph.D.”) (5/23/08)
- 11 • Eighth Report (“The Effect of Proposition 200 on Voter Registration in
12 Arizona Fifth Supplemental Report of Louis R. Lanier, Ph.D.”) (6/04/08)

13 As is apparent from the titles of Dr. Lanier’s eight reports, Dr. Lanier addressed
14 voter registration (phase I) issues in every one of his reports. With one exception
15 discussed herein, Dr. Lanier should not be permitted to testify at trial to opinions
16 disclosed for the first time in his fifth, sixth, seventh, and eighth reports.

17 Dr. Lanier’s fifth report (titled, “Third Supplemental Report”) was served on
18 April 25, 2008, and the primary subject matter of that report is his analysis of voter
19 registration in Arizona. Only four paragraphs of that report (¶¶ 13-16) address the
20 conditional provisional ballots, which is the “phase II” subject matter contemplated by
21 the scheduling order. The additional opinions disclosed in Dr. Lanier’s fifth report are
22 not based on any subsequent production of voter registration forms from Yuma County.
23 Accordingly, all new opinions disclosed in that report other than those opinions relating
24 to the conditional provisional ballots (phase II) are untimely and should be excluded.

25 Dr. Lanier’s sixth report (titled, “Fourth Supplemental Report”) was served on
26 May 9, 2008. As such, it was untimely disclosed and should be excluded. Dr. Lanier’s
27 seventh report (titled, “Second Rebuttal Report”) was served on May 23, 2008. The
28 opinions in that report should be excluded except those opinions pertaining to his
analysis regarding conditional provisional ballots (i.e., “phase II”). Dr. Lanier’s eighth
report (titled, “Fifth Supplemental Report”) was served on June 4, 2008. As such, it was
untimely disclosed and should be excluded.

Plaintiffs’ eight reports from Dr. Lanier demonstrate flagrant disregard for the
Court’s order and the spirit of cooperative discovery. Defendants have incurred

1 significant expense solely because Dr. Lanier did not disclose all of his opinions, apart
2 from his analysis of conditional provisional ballots, by the deadline for such
3 disclosure—March 28, 2008. Although plaintiffs undoubtedly will attempt to assert that
4 his delay was due to the timing of production of voter registration forms from the county
5 defendants, plaintiffs cannot dispute that the counties had produced all such forms long
6 before plaintiffs served Dr. Lanier’s supplemental report on March 28, 2008.

7 Moreover, any argument that plaintiffs should be permitted to supplement their
8 expert disclosures through the June 4, 2008, final supplementation deadline is
9 disingenuous. Supplemental disclosures are for the limited purpose of correcting
10 inaccurate or incomplete statements in earlier disclosures, not serving new opinions for
11 the first time. *E.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 324
12 (5th Cir. 1998) (excluding expert opinions disclosed after the scheduled deadline; “[t]he
13 purpose of supplementary disclosures is just that—to supplement. Such disclosures are
14 not intended to provide an extension of the expert designation and report production
15 deadline”); *Keener*, 181 F.R.D. at 640 (“Supplementation under the Rules means
16 correcting inaccuracies, or filling the interstices of an incomplete report based on
17 information that was not available at the time of the initial disclosure.”)

18 It is unfair to require Defendants to respond to each and every opinion of eight
19 different reports, when those opinions should have been disclosed long ago. Defendants
20 had no choice but to respond to those new opinions regarding voter registration in their
21 supplemental expert disclosures on May 9, 2008, the deadline for what should have been
22 Defendants’ response to plaintiff expert opinions regarding only conditional provisional
23 ballots (phase II). Those plaintiff expert opinions, however, were untimely and should
24 not be admitted at trial.

25 2. The Opinions of Richard Engstrom.

26 Dr. Engstrom served the following reports:

- 27 • First Report (“Preliminary Report of Richard L. Engstrom, Ph.D.”) (1/04/08)
- 28 • Second Report (“Rebuttal Report of Richard L. Engstrom, Ph.D.”) (3/07/08)
- Third Report (“Addendum to Preliminary Report of Richard L. Engstrom, Ph.D.”) (3/21/08)
- Fourth Report (“Report”) (3/28/08)

- 1 • Fifth Report (“Supplemental Report”) (4/01/08)
- 2 • Sixth Report (“Response to Supplemental Report of Jeffery [sic] S. Zax”) (5/23/08)
- 3 • Seventh Report (“Supplemental Report of June 4, 2008”) (6/04/08)

4 Dr. Engstrom’s opinions are solely on the issue of racially polarized voting. Dr.
5 Engstrom offers no opinions regarding conditional provisional ballots (i.e., phase II) or
6 voter registration under Prop 200 (phase I). Accordingly, the opinions disclosed for the
7 first in Dr. Engstrom’s fifth, sixth and seventh reports should be excluded at trial
8 because they were untimely disclosed.

9 3. The Opinions of Rodolfo Espino.

10 Dr. Espino served three reports on January 4, 2008, March 7, 2008, and May 23,
11 2008, respectively. Dr. Espino’s reports offer no opinions about conditional provisional
12 ballots. The opinions disclosed for the first time in Dr. Espino’s May 23, 2008, report
13 should be excluded because those opinions were untimely disclosed.

14 4. The Opinions of Jorge Chapa.

15 Plaintiffs served three reports of Dr. Chapa on January 4, 2008, March 7, 2008,
16 and May 22, 2008, respectively. Dr. Chapa offers no opinions regarding conditional
17 provisional ballots or voter registrations under Prop 200. As such, the opinions
18 disclosed for the first time in his May 22, 2008, should be excluded because they were
19 untimely disclosed.

20 **Relief Requested**

21 For the foregoing reasons, the Court should exclude any testimony by plaintiffs’
22 experts that was not disclosed by the applicable expert disclosure deadlines.
23 Specifically, the Court should exclude testimony of opinions disclosed for the first time
24 in the following reports:

25 Louis Lanier (except with regard to opinions regarding conditional provisional
26 ballots in his fifth report)

- 27 • Fifth Report (“The Effect of Proposition 200 on Voter Registration in Arizona
28 Third Supplemental Report of Louis R. Lanier, Ph.D.”) (4/25/08)
- Sixth Report (“The Effect of Proposition 200 on Voter Registration in Arizona
Fourth Supplemental Report of Louis R. Lanier, Ph.D.”) (5/09/08)

- Seventh Report (“The Effect of Proposition 200 on Voter Registration in Arizona Second Rebuttal Report of Louis R. Lanier, Ph.D.”) (5/23/08)
- Eighth Report (“The Effect of Proposition 200 on Voter Registration in Arizona Fifth Supplemental Report of Louis R. Lanier, Ph.D.”) (6/04/08)

Richard Engstrom

- Fifth Report (“Supplemental Report”) (4/01/08)
- Sixth Report (“Response to Supplemental Report of Jeffery [sic] S. Zax”) (5/23/08)
- Seventh Report (“Supplemental Report of June 4, 2008”) (6/04/08)

Dr. Espino

- May 23, 2008, report.

Dr. Chapa

- May 22, 2008, report.

Dr. Rosales

- March 7, 2008, report.

RESPECTFULLY SUBMITTED this 16th day of June, 2008.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 16th day of June, 2008, I electronically transmitted
3 the attached document to the Clerk's Office using the ECF System for filing, and
4 transmittal of a Notice of Electronic Filing to the following ECF registrants:
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/s/ H. Myers

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